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NO. 504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

CHARLES ALLEN TAYLOR, *Petitioner*,

v.

NEIL McELROY, A. TYLER PORT, *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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INTEREST OF THE AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of labor unions whose total membership is approximately fourteen million. As the principal spokesman for organized working people in the United States, the Federation has set forth in the following terms its official position on the necessity for protecting traditional American freedoms against both attack from without and erosion from within:

> "This Federation is proud that the labor unions of America have traditionally stood in the forefront of the fight for the preservation and expansion of individual civil liberties. We are proud, too, that the unions comprising this Federation were among the first to point out and take steps against the dangers to our freedom and security posed by international Communism. The fight to protect this nation against Communist aggression must be carried on with vigor and determination. But the Communist threat must and can be met without endangering our traditional liberties or impinging upon the freedoms guaranteed by the Bill of Rights." AFL-CIO Resolution on Civil Liberties and Internal Security, December 7, 1955, *AFL-CIO Constitutional Convention Proceedings*, p. 113 (1955).

A great number of the members of unions affiliated with the AFL-CIO hold jobs that are covered by one or another of the various government loyalty-security programs. The largest group of members affected, probably well in excess of a million, are employed by private firms doing defense work under federal government contracts. These workers are subject to the Industrial Personnel Security Program which is under consideration in the present case. In addition, many thousands of AFL-CIO members are covered by the Atomic Energy Security Program or the Port Security Program. A smaller number are subject to the two other main federal programs, the Government Personnel Security Program embracing civilian employees of federal departments and agencies, and the Military Personnel Security Program.

Other AFL-CIO members fall within the expanding ambit of loyalty-security programs run by states or municipalities, or by private industries acting on their own initiative. The programs of private parties, operated without government sanction, will not be discussed in this Brief since they pose legal questions different from those at issue in this case.

Union officials and union lawyers have expended much time and effort to avert or right injustices under the various loyalty-security programs.[1] We have become convinced that certain features of these loyalty-security programs, notably the use of statements by informants whose identity is kept secret from the accused and often from the adjudicating boards, constitute a denial of some of the basic rights guaranteed by the United States Constitution. As a labor organization the AFL-CIO is directly interested in seeing that union members are not deprived of the means of a livelihood through unconstitutional procedures. In a larger sense, we are interested in seeing that no American is deprived of the full exercise of his constitutional liberties, and that the nation is not deprived of the traditions of fair play that are essential to the democratic process.

ARGUMENT

I. The Scope of Loyalty-Security Programs Is a Significant Factor in Determining the Constitutionality of the Programs' Procedural Safeguards.

The essence of due process is that governmental action shall not be arbitrary. A reasoned, discriminating exercise of power has been the standard consistently imposed by this Court. *Wieman* v. *Updegraff*, 344 U.S. 183; *Slochower* v. *Board of Higher Education*, 350 U.S. 551; *Speiser* v. *Randall*, 357 U.S. 513. In *Wieman* v. *Updegraff*, *supra*, this Court unanimously struck down a state statute requiring school teachers to take an oath denying affiliation with certain designated subversive organizations. The Court reasoned (pp. 191-192):

> "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process.***
>
> "We need not pause to consider whether an abstract

[1] See Fleischman, Kornbluh, and Segal, *Security, Civil Liberties and Unions*, pp. 9-11, 16-20, 28-38 (AFL-CIO, Washington, 1957).

> right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

To avoid arbitrary action in the administration of the loyalty-security programs, it is necessary "to balance the public's interest in security and the Government's right to assure it, on the one hand, as against the liberties of the individual, on the other." *Parker* v. *Lester,* 227 F. 2d 708, 716 (9th Cir. 1955); cf. *Slochower* v. *Board of Higher Education,* 350 U.S. 551, 555.

Having marked out these general principles, we will avoid burdening the Court with a repetition of the legal arguments fully set forth by petitioner in the present case, and by the petitioner and by the American Civil Liberties Union as *amicus curiae* in the similar case pending before this Court, *Greene* v. *McElroy,* No. 180, October Term, 1958. We believe, however, that if the Court is to strike a proper balance between the supposedly conflicting interests of national security and individual liberty, there should be placed before it data on the scope, methods, and impact of loyalty-security programs throughout the country. It is our purpose to supply the Court, in summary form, with such data.

We consider that this information bears directly on the basic issue now before the Court.[2] The possibility of injury to the public must be weighed against the possibility of injury to the individual. If the worst effect of the loyalty-security programs were the discharge of a Los Alamos physicist or a State Department policy maker on the basis of the confidential reports of a professional FBI undercover agent, it may be concluded that the national interest

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[2] In addition, information regarding the various loyalty-security programs should be valuable since it is obvious that the decision in the present case may have serious implications as to the constitutionality of other programs, even though the Court will only adjudicate the actual controversy before it.

in concealing counterespionage operations would have to prevail over the individual's interest in confronting the informant. However, when these programs reach nearly one-fifth of the nation's work force, thus subjecting the Pentagon gardener, the high school algebra teacher, and the labor union shop steward to the threat of discharge and loss of reputation on the basis of tales told by the neighborhood gossip or a disgruntled former employer, then it is our opinion that the balance swings to the side of the individual's interest in a full opportunity to face and rebut his accuser.

Our single thesis is that the very scope of these loyalty-security programs requires, at the least, a rational classification of the types of information that may be used against persons in various types of positions before attaching to them the infamous badge of "loyalty-security risk." To act otherwise, we submit, is to act with the arbitrariness that is offensive to due process.

In presenting the following general discussion of the loyalty-security programs, we have drawn on several authoritative studies which have appeared in recent years, principally those by Eleanor Bontecou, the Bar Association of New York City, the Commission on Government Security, Professor Ralph S. Brown, Adam Yarmolinsky, and the Department of Defense.[3]

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[3] For the genesis and early development of loyalty-security programs, see Bontecou, *The Federal Loyalty-Security Program* (Cornell, 1953). Reviews and critiques by two separate groups of leading lawyers, educators, and public officials are contained in the Association of the Bar of the City of New York, Report of the Special Committee on *The Federal Loyalty-Security Program* (1956) and *Report of the Commission on Government Security* (1957). A searching appraisal by an individual expert will be found in Brown, *Loyalty and Security* (Yale, 1958). Illuminating examples of the workings of the programs are provided by Yarmolinsky, ed., *Case Studies in Personnel Security* (1955). An official apologia is Department of Defense, *Industrial Personnel Security Review Program, First Annual Report* (1956).

We will consider in order the loyalty-security programs conducted by the federal government and those conducted by state and local governments.

II. The Scope of Federal Loyalty-Security Programs.

A. Denial of Right of Confrontation as a Common Feature of the Programs

The federal government currently operates at least five different loyalty-security programs. They apply to groups in both federal and private employment. A common denominator of all these programs is the use of investigative agency files containing statements by secret informers. The person charged does not see these files. He does not know the identity of the informers. Even the members of the various adjudicating boards usually do not know the identity of the informers. In the present case the Hearing Board apparently rejected the sworn testimony of petitioner and eleven witnesses regarding petitioner's anti-Communist activities in his labor union, and accepted the story of the unknown informers. The Board refused to say what, if anything, it knew about the informants. (Petition for Writ of Certiorari, pp. 4-6). This Court has already had occasion to see that even "professional informers" in security cases may be guilty of lying and perjury. *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115; *Mesarosh* v. *United States*, 352 U.S. 1.

The secrecy with which the government shrouds casual informants, as distinguished from professional undercover agents, is apparently based on the belief of such agencies as the Federal Bureau of Investigation that otherwise their sources of information would dry up.[4] This belief has been questioned in both judicial and academic quarters, on the ground that it is unproven in fact and that it is an un-

[4] See statement made by FBI Director J. Edgar Hoover before Loyalty Review Board in 1947, quoted in *Report of the Commission on Government Security*, pp. 657-658 (1957).

warranted reflection on the willingness of loyal Americans to supply their government with information needed to combat subversion. *Parker* v. *Lester*, 227 F. 2d 708, 718 n. 17 (9th Cir. 1955); Brown, *Loyalty and Security*, p. 396 (Yale, 1958). The Commission on Government Security has also disapproved the admissibility of information supplied by unidentified casual informants.[5]

In any event, the practice of utilizing the statements of secret informers goes back to the original Executive Order 9835, March 21, 1947, 12 Fed. Reg. 1935, which established the Truman "loyalty program." Part IV, section 2 of that Order provided that "the investigative agency may refuse to disclose the names of confidential informants." Other loyalty-security programs have continued the practices of the original Truman program. Thus, section 9(k) of the Sample Security Regulations attached to Executive Order 10450, April 27, 1953, 18 Fed. Reg. 2489, which set up the Eisenhower security program, declares:

> "The board shall reach its conclusions and base its determination on the transcript of the hearing, together with such confidential information as it may have in its possession."

Similarly, the hearing procedure in the case at bar was governed by a Department of Defense Regulation which denies an accused the right to face his accuser.[6]

Significantly, all these authorizations for denying confrontation are framed in absolute, arbitrary terms. No

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[5] *Id.*, pp. xviii, 670.

[6] "No classified information, nor any information which might compromise investigative sources or methods or the identity of confidential informants, will be disclosed to any contractor or contractor employee, or to his lawyer or representatives, or to any other person not authorized to have access to such information." Industrial Personnel Security Review Regulation, 32 C.F.R. § 67.1-4 (Supp. 1958).

The text of the Sample Security Regulations prepared by the Attorney General for federal agencies is contained in BNA Manual, *Government Security and Loyalty*, p. 15:101.

distinction is made between the casual informant and the undercover agent. No distinction is made between the person charged who is in a highly sensitive position, and the person charged who is in a position having no substantial relationship to the national security.

Professor Brown of Yale Law School has supplied the following tabulation of the frequency with which government witnesses have appeared at hearings in a sample selection of 326 cases arising under the various federal personnel security programs:[7]

Witnesses for Government at First or Only Hearing

	No.	*Percentage*
One or two	17	5
Three or four	3	1
None	227	70
Unknown	12	3
No hearing held	67	21
	326	100

In short, out of the 247 cases for which the figures are known and in which hearings were held, there was no confrontation in 227, or 92 per cent, of the first or only hearings.

B. Federal Civilian Employees

Loyalty-security programs for civilian personnel in federal employment will be considered first, since they may be fairly designated as the prototypes for all the other programs.

As of June 30, 1958, there were 2,382,237 paid civilian employees of the federal government, excluding employees of the Central Intelligence Agency.[8] In one way or an-

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[7] Brown, *Loyalty and Security*, Appendix B, p. 491, Table 8 (Yale, 1958). The cases were collected in 1955 under the direction of Adam Yarmolinsky on a commission from the Fund for the Republic. Data were tabulated statistically by the Bureau of Social Science Research, Inc., of Washington, D. C.

[8] *World Almanac and Book of Facts*, pp. 75-76 (1959). Data supplied by United States Civil Service Commission.

other, they are all subject to discharge on loyalty-security grounds.[8]

By far the largest number of the federal employees subject to loyalty-security procedures have been those in the Executive Branch covered by the original Truman loyalty program, established pursuant to Executive Order 9835, March 21, 1947, or by its successor, the Eisenhower security program, established pursuant to Executive Order 10450, April 27, 1953.

Executive Order 10450 attempted to establish a comprehensive security program for all departments and agencies of the federal government, and in effect for all employees therein. Section 8(a) provided the standard that the employment of any person must be "clearly consistent with the interests of the national security." Procedures under the Order were to be in accordance with those provided by P.L. 733, 64 Stat. 476, 5 U.S.C. §22-1, the principal statutory basis for the Order. P.L. 733 allows the summary suspension of employees by agency heads "when deemed necessary in the interest of national security," but grants the right of an agency hearing before final termination of employment to citizens holding permanent or indefinite appointments.

In *Cole* v. *Young*, 351 U.S. 536, this Court held that P.L. 733 was intended to apply only to positions invested with the "national security," and that the Executive Order was unauthorized insofar as it applied the summary procedures of P.L. 733 to "nonsensitive" positions.

The Personnel Security Program established by Executive Order 10450 remains in effect, of course, for civilian employees of the Executive Branch who are in "sensitive"

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[8] However, the relatively few employees of the Congress and of the Judicial Branch have been little affected. *Report of Commission on Government Security*, pp. 101-107 (1957). See also Brown, *Loyalty and Security*, p. 23 n.4 (1958).

positions. They constitute probably one-fourth to one-third of the federal civilian work force.[10] All federal employees continue subject to the Hatch Act,[11] which bars federal employment to persons advocating the overthrow of our constitutional form of government. Furthermore, about 85 per cent of the federal civilian employees are in the competitive civil service.[12] These employees are covered by a Civil Service Commission regulation specifically denying appointment where there is "reasonable doubt as to the loyalty of the person involved."[13]

The fact that *Cole* v. *Young* only resulted in a restriction on the use of Executive Order 10450 in the Executive Branch, and not in any change in the practice of denying the right of confrontation even in security cases involving holders of nonsensitive positions, is starkly illustrated by *Vitarelli* v. *Seaton*, 253 F. 2d 338 (D.C. Cir. 1958). Here an employee in a nonsensitive post was originally discharged under Executive Order 10450, after being accorded a "hearing" where no witnesses appeared against him. After *Cole*, the Secretary of the Interior finished off the

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[10] Figures of 500,000-600,000 have been supplied by the Chairman of the Civil Service Commission. N. Y. City Bar Assn., *Report on the Federal Loyalty-Security Program*, p. 146 (1956). See also Brown, pp. 239-240.

[11] Originally. the Act of August 2, 1939, §9A, 53 Stat. 1148, 5 U.S.C. §118j. Codified by the expanded Act of August 9, 1955, 69 Stat. 624, 5 U.S.C §§118p-r, which also codified appropriation riders barring subversives.

[12] N. Y. City Bar Assn., *Report*, p. 55; Brown, *Loyalty and Security*, p. 401.

[13] 5 C.F.R. §2.106 (a) (7) (Supp. 1956); see also 5 C.F.R. §9.101 (s) (Supp. 1956), making the grounds for disqualification of an applicant (such as disloyalty) sufficient cause for removal of an employee. Some procedural safeguards are provided by the Lloyd-LaFollette Act, 37 Stat. 555 as amended, 5 U.S.C. §652 (charges, opportunity to reply, and written decision for employees in competitive service), and by the Veterans' Preference Act, 58 Stat. 390, as amended, 5 U.S.C. §863 (appeal and appearance before CSC for veterans having completed probationary period).

business by merely expunging the references to 10450 and upholding the employee's discharge. This case is now pending before the Court on certiorari as No. 101, October Term, 1958.

In addition to the approximately two-and-a-half million federal employees subject to loyalty-security scrutiny, there are about two million other persons listed by the Civil Service Commission as not eligible for government service.[14] Generally, federal job applicants are granted no procedural rights at all, and may not even know why they have been rejected.[15]

C. Atomic Energy Commission

Under express statutory authorization contained in the Atomic Energy Act,[16] the Atomic Energy Commission conducts its own loyalty-security program for Commission employees and for those employees of the Commission's private contractors whose work gives them access to classified information.

Insofar as the Commission's program applies to its own employees, it embraces about 7000 persons already counted in the previous section as federal civilian employees. However, the main impact of the Atomic Energy program is on the employees of private firms constructing or operating installations under contract with the Commission.

At any one time, up to about 150,000 men are working on Commission projects, though not all these employees may have to be cleared.[17] The Commission has reported that from 1947 to 1955, 503,810 persons were investigated.[18]

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[14] N. Y. City Bar Assn., *Report*, p. 115.

[15] *Id.*, p. 109-110. This has generated remedial recommendations. *Id.*, pp. 16-17; *Report of Commission on Government Security*, pp. 51-52.

[16] 68 Stat. 942, 42 U.S.C. §2165.

[17] Brown, *Loyalty and Security*, pp. 61-62.

[18] N. Y. City Bar Assn., *Report*, p. 220.

The Commission has two types of clearances, "L" for access to Confidential material only, and "Q" for access to Secret and above. Commission procedures appear more nearly fair than those of other agencies, with one of the exceptional features being the right of applicants to secure a hearing.[19]

D. Industrial Personnel Security Program

The security program under consideration in the case at bar, the program of greatest concern to labor, is the Industrial Personnel Security Program. It is operated by the Department of Defense without specific statutory authorization. Its procedures are spelled out in elaborate security provisions embodied in contracts between private firms and the armed services.[20] Approximately 3,000,000 employees having access to classified information are covered by this program.[21]

The program requires both facility clearance and personnel clearance. A contractor's plant and key officials must first be cleared. Then the contractor must solicit clearance for any employees who are to have access to Secret or Top Secret material. In all instances the standard for clearance is that it must be clearly consistent with the interests of national security.[22]

One distinctive element of the program is of particular

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[19] *Report of Commission on Government Security*, pp. 207-209.

[20] Pertinent Defense Department regulations are the Armed Forces Industrial Security Regulation, September 21, 1956 (for military departments); Industrial Security Manual for Safeguarding Classified Information, September 21, 1956 (for defense contractors); Industrial Personnel Security Review Regulation, February 2, 1955 (procedure governing appeals). The texts of these regulations are contained in BNA Manual, *Government Security and Loyalty*, p. 25:1 ff.

[21] N. Y. City Bar Assn., *Report*, p. 64; Brown, *Loyalty and Security*, p. 179 n.16.

[22] *Report of Commission on Government Security*, pp. 259-260.

interest to unions. The contractor himself can clear an employee for access to Confidential, the most common classification, affecting 2,000,000 employees. And in fulfilling this function some contractors have resorted to ill-qualified private investigative agencies.[23] If management determines that in its judgment there is "derogatory information" about an employee, further processing is left to the military department having security cognizance of the facility. Denial of security clearance need not necessarily mean dismissal for the employee, if the employer is able and willing to transfer him to a "nonsensitive" position. Union experience, however, has been that employers seldom show much sympathy in such situations.[24]

In its procedural arrangements, the Industrial Security Program provides for centralized screening and final review in Washington, with the employee having the right to appear before one of three regional hearing boards located in New York, Chicago and San Francisco.[25] At no stage, of course, does there exist the right of confrontation.

E. Port Security Program

The Port Security Program is based on the Magnuson Act of 1950,[26] implemented by Executive Order 10173, October 18, 1950, 15 Fed. Reg. 7005, as amended. The program applies to practically all seamen on American merchant vessels and to harbor workers in restricted ports, with the standard being that the person's presence "would not be inimical to the security of the United States."[27]

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[23] Brown, *Loyalty and Security*, p. 64.

[24] A Director of Security at Republic Aviation has stated: "Fire 'em. That's my answer to anyone who asks me how to handle security risks in his plant." Quoted in Fleischman, Kornbluh and Segal, *Security, Civil Liberties and Unions*, p. 35 (AFL-CIO, Washington, 1957).

[25] *Report of Commission on Government Security*, pp. 262-263.

[26] 64 Stat. 427, 50 U.S.C. §191.

[27] *Report of Commission on Government Security*, pp. 343-345.

Administration of the program is the responsibility of the Coast Guard. Certain notice and hearing procedures have already been condemned as a denial of due process in *Parker* v. *Lester*, 227 F. 2d 708 (9th Cir. 1955).

The program is unique in that it applies to persons who are in private employment having no direct ties whatever to the government. Furthermore, it is peculiarly capable of inflicting harm, since a seaman denied clearance is effectively barred from pursuing his normal calling anywhere on ships of domestic registry. The Special Committee of the New York City Bar Association has recommended that the Port Security Program be abolished.[28]

The Coast Guard reported that as of December 31, 1955, clearance under the Port Security Program had been granted to 425,334 seamen and 395,271 longshoremen.[29]

F. International Organizations Employees Loyalty Program

Executive Order 10422, January 9, 1953, 18 Fed. Reg. 239, as amended by Executive Order 10459, June 2, 1953, 18 Fed. Reg. 3183, established an International Organizations Loyalty Board in the Civil Service Commission. This board makes an "advisory determination" regarding any "reasonable doubt as to the loyalty" of any American employed by the United Nations, its specialized agencies, or the other forty-odd international organizations in which the United States participates. The power of final decision on retention naturally resides with the international organization. As of April, 1956, there were 3100 American citizens covered by the program.[30] The Special Committee of the New York City Bar Association has concluded that this loyalty program for international employees is so irra-

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[28] N. Y. City Bar Assn., *Report*, p. 143.

[29] *Id.*, p. 115.

[30] *Id.*, p. 221.

tional, useless, and actually harmful to the interests of the United States and its citizens that it should be abolished.[31]

G. Military Personnel Security Program

The present military security programs covering the approximately 2,600,000 members of the armed forces are based on Department of Defense Directive 5210.9, April 7, 1954, as amended.[32]

In general, the standards, criteria, and procedure are much like those in the programs for federal civilian employees. Certain distinctive features, however, deserve special mention.

There is a huge turnover in the military service. Under the draft, millions of young men are exposed to the rigors of a loyalty-security check without any voluntary action on their part. Furthermore, military personnel remain subject to possible security proceedings even after they have completed active duty, if they are transferred to the reserve. As of September 30, 1956, this subsidiary group of persons covered by the military programs totaled approximately 4,000,000.[33]

A special problem is presented by the issuance of less-than-honorable discharges. In *Harmon* v. *Brucker*, 355 U.S. 579, this Court held that such discharges could not be issued on the basis of an individual's activities prior to entry into the service. This did not necessarily mean that these official stamps of disapprobation will not be affixed on the basis of an individual's activities while in the nebulous reserve status. And of course *Harmon* did not stop the

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[31] *Id.*, pp. 145-146.

[32] The DOD Directive, together with the implementing regulations of the Army, Navy, and Air Force, are set forth in BNA Manual, *Government Security and Loyalty*, p. 31:51 ff. For figures on the armed forces, see *World Almanac and Book of Facts*, pp. 734-735 (1959).

[33] *Report of Commission on Government Security*, p. 111.

military from applying the brand of dishonor in reliance on the word of secret informers.

III. The Scope of State and Local Loyalty-Security Activities.

Most states and many local communities have devised their own procedures for combating the danger of subversion.[34] Such loyalty-security inquiries may be classified under three broad headings:

1. Public employees' loyalty oaths;
2. Administrative programs analogous to those for federal personnel; and
3. Loyalty-security inquiries in connection with state licensing and taxing power.

A. Public Employees' Loyalty Oaths

At least twenty-five states, including the newest, plus the territory which hopes to become the next admitted, have registered their opposition to the international conspiracy by requiring all public employees, including teachers, to take a loyalty oath.[35] Unlike traditional constitutional oaths, which are merely a pledge to uphold the Constitution and the laws, these test oaths require an employee to swear, variously, that he is not subversive, or that he has never been subversive, or that he will not be subversive while in the public employ.

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[34] Most of the material on state and local action has been adapted from Brown, *Loyalty and Security*, pp. 92-118.

[35] Alaska, Arkansas, California, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Washington, and West Virginia. Teachers have been singled out from other employees to take a traditional "constitutional" oath in Colorado, Indiana, Michigan, Nevada, New York, North Dakota and Vermont.

Frequently there is no specific means provided for enforcing such test oaths. But failure to execute them "satisfactorily" usually means automatic loss of employment, even though the refusal is clearly only a reflection of conscientious objection.[36] False swearing may result in a perjury indictment.

The scope of the coverage of loyalty oaths will be included in the estimated totals in the next section on administrative programs.

B. Administrative Programs

More elaborate security procedures, bearing an evident kinship to the federal programs, are provided by Alabama, California, Connecticut, Florida, Georgia, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, Ohio, Pennsylvania, Texas and Washington, and by Baltimore, Los Angeles, and New York City.

The Maryland Ober Law has served as a model for about a dozen states.[37] All Maryland state agencies must screen applicants for possible subversion, and must discharge incumbents wherever "reasonable grounds" exist for the belief they are subversive. A special assistant attorney general enforces the Act. Private educational institutions receiving state funds must set up machinery to ferret out subversive persons on their staffs.

California and New York have originated their own systems. In California, all public employees are subject to

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[36] Brown, *Loyalty and Security*, p. 94n.6.

[37] Md. Anno. Code. Gen. Laws, Art. 85A (1957), upheld in part in *Gerende* v. *Board of Supervisors*, 341 U.S. 56 (confrontation not an issue). The Ober Law was followed in Florida, Georgia, Maryland, Mississippi, New Hampshire, Ohio, Pennsylvania, and Washington. The Maryland Law has been combined with the Massachusetts Anti-Communist Law, 9 Anno. Laws of Mass., c.264, §20 (1956), in Alabama, Louisiana, Michigan, and Texas.

dismissal if they refuse to answer questions about past as well as present subversive activities and associations.[38] The responsibility for establishing and administering the adjudicative process rests with the employing agency.

The first out-and-out state "security risk" statute was adopted by New York.[39] Administered by the State Civil Service Commission, this law authorizes the transfer, suspension, or discharge of employees in "security" positions, such as subway conductors. In addition, New York has the Feinberg Law,[40] which authorizes the Board of Regents to use a list of subversive organizations, like the Attorney General's list, in determining the loyalty of New York teachers. A teacher's membership in a listed organization creates a presumption of disloyalty.

The best estimate is that there are up to 2,500,000 nonprofessional public employees and up to 1,000,000 professionals (of which the largest group by far consists of public school teachers) exposed to state or local loyalty-security tests of one kind or another, generally of a high intensity.[41] This makes a total ranging perhaps between three and three-and-a-half million individuals.

C. Loyalty Inquiries Connected with State Licensing and Taxing

Lawyers have borne the brunt of state efforts to rid the licensed professions of any possible taint of subversion. Test oaths are required by Alaska, Colorado, Kentucky,

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[38] Calif. Govt. Code §§1027.5, 1028.1 (for all employees except teachers); Calif. Educ. Code §§12600-12607 (for teachers).

[39] N. Y. Laws 1951, c.233, as amended by N. Y. Laws 1954, c.105, and reenacted periodically. Upheld in *Lerner* v. *Casey*, 357 U.S. 468 (confrontation not an issue).

[40] N. Y. Laws 1949, c.360. Upheld in *Adler* v. *Board of Education*, 342 U. S. 485 (confrontation not an issue).

[41] See Brown, *Loyalty and Security*, pp. 166-169, 178.

Oklahoma, and Washington. Furthermore, applicants for the bar in about one-third of the states must complete forms under oath which contain questions dealing directly with loyalty matters. Certain arbitrary aspects of these systems have already engaged the attention of this Court.[42]

The incidence of loyalty tests in connection with other occupational licensing is sporadic and on occasion wryly amusing: pharmacists in Texas, waterfront employees in the port of New York, professional boxers and wrestlers in Indiana, and insurance salesmen and at least one piano dealer in the District of Columbia.[43]

Article 20, §19 of the California State Constitution prohibits subversives from receiving a tax exemption under state law. Without passing on the state constitutional provision itself, this Court has already struck down as a denial of due process California's implementing legislation as it applied to a veteran and a church claiming property-tax exemptions.[44]

The number of persons affected by loyalty inquiries connected with the exercise of state or local licensing and taxing powers is unknown.

IV. Summation: The Scope and Impact of Loyalty-Security Programs.

Figures have already been provided for the estimated coverage of each of the broad categories of federal and state loyalty-security programs. In seeking to obtain a combined estimate in round figures for the direct coverage of all the programs at the present time, several special allowances will be made. The two million persons listed

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[42] *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; *Konigsberg* v. *State Bar of California*, 353 U.S. 252.

[43] Brown, *Loyalty and Security*, p. 118.

[44] *Speiser* v. *Randall*, 357 U.S. 513; *First Unitarian Church* v. *County of Los Angeles*, 357 U.S. 545.

by the Civil Service Commission as ineligible for government employment will not be counted. The four million reservists technically subject to the military program will not be counted. Finally, since the only official figures available on the Port Security Program are the total clearances of 800,000, an arbitrary figure of 300,000, or about one-third, will be chosen to represent a rough estimate of current exposure. With these allowances, the result is:

	In thousands
Federal Civilian Employees	2400
Atomic Energy Commission	150
Industrial Personnel	3600
Port Security	300
International Organizations	3
Military Personnel	2600
State and Local Employees	3500
Total, round off to	13,000

Professor Brown of Yale Law School has provided a different type of tabulation of current loyalty test exposure, figured according to the profession or occupation of the employee rather than the particular governmental program. His totals follow:[45]

	In thousands
Professions, including teachers	1600
Managers	300
Government and military	7200
Extractive industry	—
Manufacturing, construction, transport, utilities	4500
Trade, service, finance	—
Agriculture	—
Total, round off to	13,500

These figures include an estimate of about one-and-a-half million persons who are subject to a loyalty-security check

[45] Brown, *Loyalty and Security*, p. 181.

by employers acting on their own initiative. Eliminating this group, there are left roughly 12,000,000 persons out of a total working population of 65,000,000 who are presently exposed to loyalty scrutiny of some sort under programs conducted or sponsored by the federal or state and local governments.

Of this vast contingent of 12,000,000 persons, only a small proportion are in positions which can reasonably be regarded as related to the national security. Restricting its studies to the approximately 6,000,000 persons whom it estimated as being covered by the civilian security programs of the federal government, the Special Committee of the New York City Bar Association concluded that coverage could properly be reduced to less than 1,500,000. The Committee cited official figures to the effect that there are only between 500,000 and 600,000 sensitive civilian federal positions, and only 800,000 positions in the Industrial Security Personnel Program involving access to Secret or Top Secret material.[46] Professor Brown estimates that with the military included, the programs with some basis in security considerations now reach between seven and eight million persons. He believes that by restricting coverage to sensitive positions the total embraced by all the security programs could be cut to not much more than 2,000,000.[47]

To Professor Brown is also owed a debt for advancing into the tangled thicket of official figures, and coming out with a considered calculation of the total number of dismissals, or denials of clearance equivalent to dismissals, under the various security programs. A summary of his findings is as follows:[48]

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[46] N. Y. City Bar Assn., *Report*, p. 146.

[47] Brown, *Loyalty and Security*, p. 253.

[48] *Id.*, p. 182. For detailed estimates, see *id.*, Appendix A, pp. 487-488. Detailed statistics from official sources are contained in N. Y. City Bar Assn., *Report*, Appendix A, pp. 219-226.

All federal employees, including military	3900
Private employees subject to federal programs	5400
State and local government employees	1000
Self- and privately employed	1200
Total	11,500

From this total should be struck the estimate of 1200 persons who lost employment through private screening. This leaves a round figure of 10,000 individuals who have been denied clearance in programs operated under governmental authority.

Regardless of whether a charged employee is cleared or not, a security proceeding may be very costly to him in terms of both time and money.[49] And almost completely incalculable is the damage to democratic traditions, to employee morale, to the inquiring mind.[50]

In assessing the reasonableness of this quest for security via the testing of ideology,[51] it seems not inappropriate to add one final item to the scales, now that we have placed in the balance the scope and impact of the programs. Measured by the goal apparently aimed at, this is the achieve-

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[49] In the sample selection of 326 cases referred to in note 7 *supra*, at least 65 per cent of the proceedings resulted in clearances. Nevertheless, 65 per cent of the persons under charges were discharged or suspended without pay pending final disposition of the case. About 60 per cent of the cases took more than six months to process. In 25 per cent of the cases counsel fees ranged from $200 to $499, and in about 30 per cent they were $500 or more. Brown, *Loyalty and Security*, Appendix B, pp. 493-494, Tables 13-15, 17.

[50] A survey of opinion on the "intangible costs" is made in N. Y. City Bar Assn., *Report*, pp. 124-133, 212-215.

[51] That the thrust of questioning in security hearings is primarily ideological will be seen from Brown, *Loyalty and Security*, pp. 42-43, and Appendix B, p. 492, Table 9. Cf. Yarmolinsky, ed., *Case Studies in Personnel Security* (1955).

ment of the myriad loyalty-security programs and their array of secret informers: so far as is known, there has been uncovered by these procedures not one single spy or saboteur or revolutionary.[52]

CONCLUSION

For the foregoing reasons and for the reasons stated in the Brief for Petitioner, the judgment of the Court of Appeals should be reversed.

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[52] Statement of Loyalty Review Board Chairman Seth S. Richardson, "The Federal Employee Loyalty Program," 51 Col. L. Rev. 546, 556 (1951); questioning of Civil Service Commission Chairman Philip Young, *Hearings before a Subcommittee to Investigate the Administration of Federal Employees' Security Program of the Senate Committee on Post Office and Civil Service*, 84th Cong., 1st Sess., Pt. 1, pp. 707-708 (1955); Brown, *Loyalty and Security*, p. 36n.21. See also cases collected in Department of Defense, *Industrial Personnel Security Review Program, First Annual Report* (1956); Yarmolinsky, ed., *Case Studies in Personnel Security* (1955).